

TITLE 327 WATER POLLUTION CONTROL BOARD

LSA Document #10-659

SUMMARY/RESPONSE TO COMMENTS FROM THE SECOND PUBLIC COMMENT PERIOD

IDEM requested public comment from May 2, 2012, through June 1, 2012, regarding new rules and amendments to rules in 327 IAC 5 and 327 IAC 15 concerning NPDES general permits. IDEM received comments from the following commentors:

Jessica Dexter, Environmental Law & Policy Center, with Kim Ferraro, Hoosier Environmental Council and Bowden Quinn, Sierra Club Hoosier Chapter (ELPC)

Thomas W. Baker, Hatchett & Hauck, LLP, representing Steel Dynamics, Inc., Engineered Bar Products Division (TWB)

Charles L. Nichols, Danisco USA Inc. (CLN)

Following is a summary of the comments received and IDEM's responses thereto:

Comment: One of the biggest problems with Indiana's general permit program is that it allows unlimited discharges to waters that are already suffering the adverse effects of pollution. A specific example is that IDEM under the existing general permit rules allows new or increased discharges of the pollutants for which a waterbody is listed as "impaired" on Indiana's 303(d) list without any further review of whether those discharges will cause or contribute to violations of water quality standards. This is in direct violation of federal and Indiana law. See 40 CFR 122.44 (d) and 122.4(i) and 327 IAC 5-2-10(a)(4) and 5-2-7(f). It is probable that discharges of a pollutant into waters identified as impaired for that pollutant will cause or contribute to violations of water quality standards. In order to determine whether a discharge would in fact cause or contribute to a violation of water quality standards, IDEM needs to look carefully at the proposed discharge and the condition of the receiving waters. This is accomplished through the individual permit process. Accordingly, language should be added to the exclusions in 327 IAC 15-2-6 (listing instances when an individual permit is required in lieu of a general permit) to prohibit the use of a general permit in a receiving stream that is listed as impaired for a pollutant proposed to be discharged by that activity or operation. (ELPC)

Response: This rule would require the commissioner to issue general permits that are consistent with all applicable guidelines and requirements of the Clean Water Act (CWA) and regulations promulgated under the CWA, including 40 CFR 122.4(i) and 40 CFR 122.44(d), as required by section 402 of the CWA (33 U.S.C. 1342). See proposed 327 IAC 15-2-10. The commissioner retains the right to require an individual permit in any instance where an individual permit is deemed appropriate.

Comment: It is a fundamental tenet of both the federal and state general permit program that authority is retained to require individual permits (rather than general permits) in appropriate circumstances, even if a general permit is available for that type of discharge. The proposed language in 327 IAC 15-2-9(a) gives the commissioner authority to require individual permits, but appears to limit that authority to existing discharges. This is so wrong that we assume it must be a mistake. The Commissioner must have authority to require individual permits for new discharges as well as existing discharges. (ELPC)

Response: The terms "existing discharge" and "new discharge" are not defined in the Clean Water Act, 40 CFR 122 or Indiana laws or rules. No discharge to which 40 CFR 122 applies is excluded from the permitting authority transferred to the commissioner.

Comment: Along these lines, we also recommend that the language of 327 IAC 15-2-9(a) be changed from permissive to mandatory (i.e. change “may” to “must”), at least under certain circumstances. The Commissioner’s authority to require individual permits has rarely if ever been exercised. Yet several of the circumstances listed under 9(a) would lead to illegal discharges under the Clean Water Act if allowed to proceed under a general permit. The IDEM Commissioner does not have discretion to authorize discharges that do not comply with Clean Water Act requirements, and accordingly should not have discretion about whether an individual permit is necessary when the general permit is not protective. For example, discharges cannot be legally authorized under a general permit if the general permit cannot ensure compliance with water quality standards, if more stringent effluent limitations are required, if more stringent limits are necessary to comply with TMDL wasteload allocation requirements. These sections should be included in a list where individual permits are always required. A separate list of circumstances can include the remainder of the list (non-exclusively, so that other circumstances can be accommodated as necessary) and can provide more discretion for the Commissioner to exercise the authority to require an individual permit. (ELPC)

Response: This rule would require the commissioner to issue general permits that are consistent with all applicable guidelines and requirements of the Clean Water Act (CWA) and regulations promulgated under the CWA. Section 402 of the CWA (33 U.S.C. 1342) does not allow the commissioner to issue permits that violate the CWA. The current requirements for administrative rulemaking demand ascertainable standards and do not permit the variability in requirements recommended by the commentor.

Comment: The proposed language in 327 IAC 5-2-1.8 lists a number of exemptions that “do not require an NPDES permit.” Subsection (1) lists “any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel.” This exemption seems to directly contradict U.S. EPA’s required regulation of vessel discharges under a 2006 court order. See, <http://cfpub.epa.gov/npdes/vessels/background.cfm>. The U.S. EPA draft vessel general permit would require an NPDES permit for “discharges incidental to the normal operation of all non-recreational, non-military vessels of 79 feet or greater in length which discharge in waters of the United States.” http://www.epa.gov/npdes/pubs/vgp_factsheet_english.pdf Indiana cannot override this federal permit requirement in its rules, and should not convey the false impression that a permit is not required for these discharges. (ELPC)

Response: This comment addresses conformity with the federal NPDES program. IDEM will study this comment in light of recommendations received from EPA Region 5 and make appropriate changes.

Comment: The proposed language in 327 IAC 15-2-2 (d) would allow the IDEM Commissioner to “authorize a person to discharge under a general permit without submitting a notice of intent if the commissioner finds that a notice of intent would be inappropriate.” As a policy matter, regulating discharges under a general permit without requiring a notice of intent is a bad idea and does not provide IDEM the information necessary to issue other pollution permits in watersheds with such discharges or undertake watershed planning (e.g. TMDLs). Similarly, failing to require an NOI allows “secret” pollution to our waters and prevents the public from making informed personal decisions about whether or not it is safe to swim or eat fish from a given lake, river or stream. Accordingly we ask that this provision be removed from the proposed rules. To the extent that this provision remains in the rules despite our objection, the rule adopted in Indiana **must** track the federal rule that sets the standards for such a

decision. The current draft rule does not contain any version of the following language from 40 CFR 122.28 (b)(2)(v):

“In making such a finding, the Director shall consider: the type of discharge; the expected nature of the discharge; the potential for toxic and conventional pollutants in the discharges; the expected volume of the discharges; other means of identifying discharges covered by the permit; and the estimated number of discharges to be covered by the permit. **The Director shall provide in the public notice of the general permit the reasons for not requiring a notice of intent.**”

It is absolutely critical that the public be given notice and an opportunity to comment on any decisions not to require NOIs for discharges under a general permit. (ELPC)

Response: 327 IAC 15-2-2(d), as well as 327 IAC 15-2-5 which governs the notice of intent, references 40 CFR 122.28(b)(2)(v) and provides that the commissioner would make a finding that a notice of intent would be inappropriate in accordance with that paragraph. The language of 327 IAC 15-2-2(d) is functionally equivalent to the federal language which includes the requirement to include the reasons for not requiring the notice of intent in the public notice of the permit. In fact, subsection (d) is more restrictive than the federal language in that it includes a list of sources and discharges for which a notice of intent must always be required. Waiving the notice of intent requirement can be critical in certain circumstances, such as a general permit where thousands of entities would seek coverage for small discharges and the volume of the notices of intent submitted for review and individual action would overwhelm IDEM’s permitting staff. This rulemaking specifically prohibits the commissioner from issuing a general permit that conflicts with federal law. See 327 IAC 15-2-10.

Comment: 327 IAC 15-2-5 should require the department to make notices of intent available to the public so people can know when a discharger is operating under a general permit. This should include posting notices of intent on the IDEM website. (ELPC)

Response: Proposed 327 IAC 5-2-1.6 requires the commissioner to issue permits consistent with 40 CFR 122.28(b) for notices of intent. Notices of intent are public records under IC 5-14-3 and will be made available to the public upon request.

Comment: Amend 327 IAC 5-3-12(d)(1)(A) to read: A brief description of the types of activities or operations **(or subsets of activities or operations)** to be covered by the general permit; (ELPC)

Response: This comment addresses conformity with the federal NPDES program. IDEM will study this comment in light of recommendations received from EPA Region 5 and make appropriate changes.

Comment: Amend 327 IAC 15-1-1 to read: The purpose of this article is to establish **IDEM’s authority to issue general permits for qualified NPDES permitted discharges.** (ELPC)

Response: This comment addresses conformity with the federal NPDES program. IDEM will study this comment in light of recommendations received from EPA Region 5 and make appropriate changes.

Comment: Amend 327 IAC 15-1-3(a) to read: The commissioner may, ~~in~~ **as a term or condition of** a general permit issued under this article, require any person who is subject to this article ... (ELPC)

Response: This comment addresses conformity with the federal NPDES program. IDEM will study this comment in light of recommendations received from EPA Region 5 and make appropriate changes.

Comment: Amend 327 IAC 15-2-9(a)(5) to read: A water quality management plan (**e.g. a TMDL**) containing more stringent requirements applicable to such discharges is approved. (ELPC)

Response: This comment addresses conformity with the federal NPDES program. IDEM will study this comment in light of recommendations received from EPA Region 5 and make appropriate changes.

Comment: Amend 327 IAC 15-2-10 to read: No general permit shall be issued, **and no discharges authorized under a general permit**, where the terms and conditions of the permit do not comply with the applicable guidelines and requirements... (ELPC)

Response: Since the general permit itself is the vehicle that authorizes a discharge, the language of this section conforms to federal law and no change is necessary.

Comment: The stated scope of the rulemaking is clearly limited to the *General* NPDES Permit Program, but several revisions are made to the regulations concerning *individual* NPDES permits. (See, e.g., 327 IAC 5-2-3, 327 IAC 5-2-8 (new subsection 7), 327 IAC 5-2-14(b), 327 IAC 5-2-22(a), and 327 IAC 5-4-6.) In particular, the attempt to incorporate the MSGP requirements into *individual* NPDES permits is completely unrelated to the revisions of Indiana's *General* Permit Program. (TWB/CLN)

Response: As stated in the notices, this rulemaking changes only the requirements of the general permit program. It does not impose EPA general permit requirements on individual permittees. Because of the construction of the NPDES permit rules, making the required changes in the general permit program also requires us to make conforming changes in sections that apply to both individual and general permits. Regardless as to whether the language is used in an individual or a general permit, the department may consider the current MSGP language. The effect of this rule would be to transfer the authority to write NPDES general permits from the board to the commissioner, and to require the commissioner to write those permits in conformity with current federal standards.

Comment: The incorporation of the MSGP requirements into individual NPDES permits would substantially burden individual permittees. These requirements are vaguely worded and are often contradictory, making compliance extremely difficult to establish. They are also overly burdensome. For example, the MSGP terms can be construed to require storage of large amounts of raw materials in indoor areas or the installation of containment berms around these areas. This is at least very costly, and in many cases impossible. The MSGP also imposes container labeling, spill prevention, dust control, and identification of historical spills despite existing laws that require these activities where appropriate, such as the federal Spill Prevention Control and Countermeasures rule for storage of a certain amount of petroleum. These new requirements have very little relationship to stormwater control, and existing rules provide sufficient control over these activities. The MSGP can even be construed to regulate extremely trivial activities, such as the manner in which snow is plowed. IDEM should not propose that the Board layer on these new and unnecessary substantive requirements for NPDES individual permits, and it certainly should not be done via this general permit rulemaking. (TWB)

Response: This rulemaking does not incorporate MSGP provisions into every individual permit. It allows the commissioner to consider the provisions of the current federal standards as expressed in the MSGP when establishing individual permit conditions for certain storm water discharges, and helps ensure that those individual permit conditions would be consistent with the current federal standards for similar discharges.

Comment: The incorporation of MSGP requirements into individual NPDES permits would substantially burden individual permittees. These requirements are vaguely worded and are often contradictory, making compliance extremely difficult to establish. They are also overly burdensome. For example, the MSGP states that a minimum, the permittee “*must* implement preventive measures such as barriers between material storage and traffic areas, secondary containment provisions, and procedures for material storage and handling.” This means that the permittee *must* incur costs to set up barriers between material storage and traffic areas, such as tanks, 55 gallon containers, totes, and pallets of raw materials and traffic areas. The identification of a “traffic area” is very subjective. The MSGP could also require expensive grading, berming, or curbing around material loading and unloading areas, or require that they be located indoors. These are but two examples of extensive and expensive compliance requirements that could apply. (CLN)

Response: This rulemaking does not incorporate MSGP provisions into every individual permit as the commentor states. It allows the commissioner to consider the provisions of the current federal standards expressed in the MSGP when establishing individual permit conditions for certain storm water discharges and helps ensure that those individual permit conditions would be consistent with the current federal standards for similar discharges.

Comment: The commentor is also concerned that the proposed rule lacks constraints and clear guidance on the types of requirements that can be placed on permittees. This subjects permittees to the inconsistent interpretations of permit writers and of inspectors from one visit to another. The vagueness of the rules proposed by IDEM will not only be open to interpretation by agency employees, but for the same reason will open companies to third party complaints during the permitting process and in complying with issued permits. In sum, IDEM should not propose that the board layer on these new substantive requirements for NPDES individual permits, and certainly should not do so via this general permit rulemaking. (CLN)

Response: Please see the previous comment.

Comment: The incorporation of U.S. EPA general permit terms into NPDES permits is unnecessary given existing state requirements for addressing stormwater. For example, Indiana’s rules already require individual NPDES permit holders to develop and implement a detailed Storm Water Pollution Prevention Plan for dealing with storm water at the permitted facility. There is no indication that the existing rules are in any way deficient or that the proposed new burdens on industry will somehow lead to any measurable water quality improvements. IDEM has provided no justification for imposing the new requirements. (TWB/CLN)

Response: Please see the previous comment.

Comment: There is also no legal reason to adopt these standards. The MSGP is applicable only to states that have no delegated NPDES permit program and to certain federal facilities and lands. None of these conditions exist in Indiana. IDEM is inappropriately claiming that EPA general permits are federal requirements applicable to Indiana’s individual NPDES program because IDEM cannot have less restrictive requirements than the EPA’s general permits noted above. In actuality, the EPA general permits were issued for states with EPA-administered NPDES programs and are not required for delegated state NPDES programs. Many states have not adopted the EPA general permit requirements nor are they required to per the federal law. Each state can develop its own stormwater individual and general permit requirements, as appropriate. There is no federal requirement to impose the standards of the U.S. EPA MSGP in Indiana, let alone in individual NPDES permits. (TWB/CLN)

Response: It is correct to say that each state can develop its own storm water individual and general permit language and it would seem to make sense to develop language that is consistent with language developed by U.S. EPA to address storm water associated with industrial activity for both individual and general permits to address discharges of storm water associated with industrial activity, as state requirements must be at least as stringent as federal requirements.

Comment: Furthermore, by applying the federal NPDES general permit to individual permits, IDEM is creating requirements in the individual NPDES permit program that do not exist in federal law. There is no federal requirement to impose the standards of the U.S. EPA MSGP in Indiana, let alone to impose the MSGP provisions in individual NPDES permits. The newly proposed incorporation of federal general permit terms would be a requirement that is “more stringent than a restriction or requirement imposed under federal law or that applies in a subject area in which federal law does not impose restrictions or requirements” as described in IC 13-14-9-4. Under that statute, IDEM must identify this rulemaking as being beyond federal requirements, provide a rationale for the adoption of such requirements, and identify the materials relied upon in developing the requirement. IDEM has failed to follow these legal requirements. (TWB/CLN)

Response: For individual NPDES permits, IDEM has already developed language that is consistent with the language developed by the EPA and contained in the MSGP. The intent would be to develop stormwater language in the General Permit that is consistent with the language that is already in use in individual NPDES permits and with language already developed and in use by U.S. EPA.

Comment: There is no practical reason and no legal basis to adopt this expansive rulemaking and its new stormwater requirements. The rulemaking should focus solely on the five-year permit term and the perceived conflict of interest issues. By attempting to revise other aspects of its permit program without following proper procedures, IDEM is running afoul of the legal requirements for rulemaking such as this. We request that IDEM drop its efforts to incorporate the burdensome and unnecessary MSGP requirements, and in particular drop any attempt to alter the individual NPDES permit requirements via this general permit rulemaking. (TWB/CLN)

Response: IDEM has been issuing permits since 2010 that contain stormwater language that is consistent with the MSGP, at the instruction and with the approval of EPA. The intent is for the individual and general permit language to be consistent.

Comment: IDEM also mistakenly claims the rulemaking will have no economic impact on the regulated community and fails to identify that the agency will for the first time impose new requirements on Indiana NPDES dischargers. However, such changes go beyond the requirements of federal law, because the changes will apply U.S. EPA regulations and guidance that never have applied and were never meant to apply to Indiana dischargers. As such, IDEM is incorrect to claim that this rule will have a zero dollar economic impact because the rule will impose significant new requirements and might even require capital improvements in an attempt to comply with the new stormwater provisions. This is particularly true with regard to individual NPDES permittees. Incorporation of these more stringent federal terms into Indiana NPDES permits will most certainly have a significant economic impact on NPDES permit holders. (TWB/CLN)

Response: The effect of this rulemaking is to transfer the authority to write general permits from the board to the commissioner. Prior to this rulemaking, the board had not updated its

requirements to conform to the currently existing federal general permit requirements. This rulemaking would require the commissioner to follow those federal minimum requirements. Since the current federal rules have been in place for some time, any additional costs result from those existing federal standards which the state is required to incorporate as part of its delegation authority and not from this transfer of authority to the commissioner. Any “new” obligations are directly required under federal law. This rulemaking brings IDEM’s NPDES program into conformity with current federal law and standards as required under Indiana’s delegation authority. IDEM has already developed language consistent with the MSGP and has been incorporating that language into individual permits since 2010.

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